COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

FOREIGN ISSUERS: THE DULY AUTHORIZED REPRESENTATIVE REQUIREMENT OF THE SECURITIES ACT OF 1933

Bentzion S. Turin[*]

I. INTRODUCTION

Internationalization of the world's capital markets has been one of the most significant economic developments in the late 20th century.[1] The resultant transnational flow of capital has created development opportunities for poorer nations along with growth opportunities for investors from wealthier nations.[2] Many foreign issuers have turned to the United States ("US") capital markets, and the number of foreign securities issued and traded in the US has dramatically increased.[3]

---

[*] Associate, Vinson & Elkins L.L.P., Houston, Texas; University of Houston Law Center, J.D., 2000.

1. *See* Andreas J. Roquette, *New Developments Relating to the Internalization of the Capital Markets: a Comparison of Legislative Reforms in the United States, the European Community, and Germany*, 14 U. PA. J. INT'L BUS. L. 565, 565 (1994) (noting that the internationalization of securities markets reflect the globalization of business activities and that such a development has been described as "major, dramatic, tremendous, and even revolutionary").

2. *See, e.g.*, Alex Y. Seita, *Globalization and the Convergence of Values*, 20 CORNELL INT'L L.J. 429, 439–48 (1997) (discussing the effects of economic globalization and the interdependency of international markets).

3. From 1993 to 1995, almost $50 billion in securities were registered annually in the U.S. for sale by foreign private issuers. *See* FOREIGN ISSUERS AND THE U.S. MARKET, OFFICE OF INTERNATIONAL CORPORATE FINANCE, DIVISION OF CORPORATION FINANCE, SECURITIES AND EXCHANGE COMMISSION, *in* INTERNATIONAL SECURITIES MARKETS 1996 77, 79 (PLI Corporate Law and Practice Course Handbook Series No. B4-7166, 1996), *available at* WL 961 PLI/CORP 77. "In 1996 . . . the total dollar amount of securities registered for sales by all foreign private issuers exceeded $80 billion . . . . As of December 31, 1996, there were 881 foreign companies from 48 countries filing reports with the [SEC]." Brian Lane & Paul M. Dudek, *Foreign Issuers and the U.S. Market*, *in* INTERNATIONAL SECURITIES MARKETS 1997 327, 329 (PLI Corporate Law and Practice Course Handbook Series No. B4-7215, 1997), *available at* WL 1011 PLI/CORP 327. "In 1997 . . . the total dollar amount of securities registered for sale by all foreign issuers exceeded $133 billion . . . ." Brian Lane & Paul M. Dudek, *Foreign Issuers and the U.S. Market*, *in* INTERNATIONAL SECURITIES MARKETS 1998 9, 11 (PLI Corporate Law and Practice Course Handbook Series No. B4-7241, 1998), *available at* WL 1077 PLI/CORP 9. "In 1998 . . . the total dollar amount of securities registered for sale by all private issuers exceeded $170 billion . . . . As of December 31, 1998, there were over 1,100 foreign

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

Foreign companies choose the US capital markets because of their depth and stability.[4] These strengths are due in large part to the registration, reporting and anti-fraud provisions of the federal securities laws.[5] The securities laws create transparency and accountability—the twin foundations of healthy, robust trade in securities.[6]

Notwithstanding the attractiveness of the US capital markets, foreign issuers often choose to float their securities elsewhere.[7] Foreign companies that wish to sell securities in the US must comply with the federal securities laws,[8] therefore issuers considering issuing securities in the US consider the impact of the federal securities laws before committing to the US capital market. As a result, the US share of the international securities market is directly linked to the attractiveness of the federal securities laws.

It follows that Congress and the Securities and Exchange Commission ("SEC") must remain ever vigilant to the demands of the marketplace if the US is to compete effectively for global securities business. The securities laws should constantly be reviewed and amended. The Internet expansion and the accompanying information explosion currently underway

---

companies from 56 countries filing reports with the [SEC]." Brian Lane & Paul M. Dudek, *Foreign Issuers and the U.S, Market*, *in* INTERNATIONAL SECURITIES MARKETS 1999 17, 21 (PLI Corporate Law and Practice Course Handbook Series No. B0-00HN, 1999), *available at* WL 1141 PLI/CORP 17.

4. *See* Mark Saunders, *American Depository Receipts: An Introduction to U.S. Capital Markets for Foreign Companies,* 17 FORDHAM INT'L L.J. 48, 50 (1993) (noting that foreign companies were attracted to the depth of the U.S. capital markets); John Fedders, *Policing Trans-Border Fraud in the United States Securities Markets: The 'Waiver by Conduct' Concept—A Possible Alternative or a Starting Point for Discussions?,* 11 BROOK. J. INT'L L. 477, 503 n.50 (1985) (indicating that foreign companies participate in U.S. securities markets because of their stability).

5. *See* Merritt Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom,* 95 MICH. L. REV. 2498, 2611 (1997) (stating that registration protects the U.S. capital markets and its investors); Cynthia Williams, *The Securities and Exchange Commission and Corporate Social Transparency,* 112 HARV. L. REV. 1197, 1207, 1210 (1999) (enumerating the four categories of disclosure in the securities laws to prevent fraud).

6. *See* Williams, *supra* note 5, at 1199 (stating that the federal securities laws are responsible for the financial transparency in U.S. markets); *see also id.* at 1229 (highlighting Rep. Sam Rayburn's introductory statement to the House of Representatives on the Securities Act which stated that a "major purpose of the legislation was to impose higher standards of public accountability on corporate officers and directors").

7. *See* Roquette, *supra* note 1, at 565, 569 (noting the increase in trading in the U.S. and conversely how the U.S. market has become highly unattractive to foreign investors).

8. *See* Act of May 27, 1933, ch. 38, § 5, 48 Stat. 77 (1933) (proscribing the sale of unregistered securities).

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

heighten the need for this review. Provisions that made sense in 1933 may now be obsolete.

The securities laws seek to facilitate the free flow of capital. At the same time, the laws contain protections that tend to increase transaction costs. Measures that protect investors usually increase issuers' and dealers' costs. This inherent tension further implicates the need for careful assessment of the securities laws as they relate to issuers. In particular, the securities laws must attempt to minimize foreign issuers' transaction costs and maximize their return on capital. US investors will not benefit from "protections" that would cause foreign issuers to turn to the Economic Union ("EU") or other non-US markets. In recent years the SEC has addressed some of these issues by streamlining its foreign issuer requirements.[9] However, the securities laws still contain many inefficiencies.[10] Congress and the SEC must ferret out those inefficiencies if the US is to remain the destination of choice for foreign issuers.[11]

This paper focuses on one such provision. Section 6(a) of the Securities Act of 1933 requires foreign issuers to have their registration statements signed by their "duly authorized representative in the United States" ("USDAR").[12] Foreign issuers, like domestic issuers, must also affix the signatures of their principal executive officers, their principal financial officers, their principal accounting officers, and the majority of their boards of directors on registration statements submitted to the SEC.[13]

The Securities Act provides little information about the USDAR requirement. The statute does not describe any requisite qualifications, nor does it delineate the responsibilities of a USDAR. It appears from the Act's legislative history, however, that Congress intended for the USDAR to be liable

---

9. *See* Edward F. Greene et al., *Hegemony or Deference: U.S. Disclosure Requirements in the International Capital Markets*, 50 BUS. LAW. 413, 414 (1995) (discussing the SEC's recent integration of disclosure requirements for non-U.S. companies under the Securities Act of 1933 and the Securities Exchange Act of 1934).

10. *See, e.g., id.* at 415–16 (pointing out that the streamlining accommodations are relatively insignificant given that non-U.S. companies are still required to prepare their financial statements as if U.S. Generally Accepted Accounting Principles had been followed).

11. *See* sources cited *supra* note 3 (noting the rise in foreign activity in the U.S. securities market).

12. 15 U.S.C. § 77f(a) (1994).

13. *See id.* (requiring that one copy of a registration filing "shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors").

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

under the fraud provisions of the Securities Act.[14] Some have also suggested that the USDAR must be a natural person and not a corporation.[15] This paper seeks to clarify these issues by closely analyzing the statute, its legislative history, and relevant SEC releases.

Upon the advice of their US attorneys,[16] many foreign issuers hire Puglisi & Associates ("Puglisi"), a Delaware based company, to serve as their duly authorized representative.[17] Donald J. Puglisi, the MBNA America Business Professor at the University of Delaware, founded the firm in 1973.[18] The firm does not advertise or maintain a website so it is difficult to obtain information about their activities and services.[19] Puglisi charges approximately $500.00 per year per issuance to serve as a company's USDAR. These charges add up quickly as companies often have many different registered securities. As Puglisi appears to be the only company offering this service,[20] many foreign issuers seem to have little choice but to hire them.

This paper argues that Congress should eliminate the USDAR provision contained in Section 6(a). This small measure would simplify the registration process for foreign issuers and reduce transaction costs.[21]

---

14. *See Federal Securities Act: Hearing on H.R. 4314 Before the House Comm. on Interstate and Foreign Commerce,* 73d Cong. 14 (1933) (statement of Hon. Huston Thompson, former member of the Federal Trade Commission), *reprinted in* 2 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 20, at 14 (J.S. Ellenberger & Ellen P. Mahar eds., 1973) (discussing the fraud clause, Mr. Thompson highlights that the American agent is not excluded from liability).

15. Telephone Interview with Donald J. Puglisi, Founder, Puglisi & Associates (Dec. 21, 1999).

16. *See id.* (stating that many foreign issuers hire Puglisi & Associates upon the advice of their attorneys).

17. *See, e.g., Filing of Anglogold, a South African company, with the South African Securities Commission* (visited May 16, 2000) <http://www.ince.co.za/sens/july98/200798/ANGL.HTM> (reporting that Puglisi & Associates is Anglogold's authorized representative in the U.S.).

18. *See University of Delaware Medal of Distinction Award* (visited May 16, 2000) <http://www.udel.edu/alumni/distinction/puglisi.html>.

19. Telephone interview with Donald J. Puglisi, Founder, Puglisi & Associates (Dec. 21, 1999) (explaining that his firm relies solely on word of mouth referrals).

20. Telephone interview with Donald J. Puglisi, Founder, Puglisi & Associates (Dec. 21, 1999).

21. *See* 15 U.S.C. § 77f(a) (1994), which states that:

> Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

The USDAR requirement is unnecessary, inefficient and burdensome. The general requirements under Section 6(a) sufficiently protect US purchasers of foreign securities. The costs and administrative burdens imposed by the USDAR provision are bad for business and may discourage foreign companies from issuing securities in the US. Furthermore, given the fact that many companies are employing third party "representatives," it is likely that these companies are not satisfying their statutory requirements. As will be demonstrated below, it appears from the legislative history that Congress intended to prevent companies from hiring unrelated third parties to serve as their USDAR. The practice of employing Puglisi or another unrelated third party is not only expensive, but it may also be legally insufficient.

For example, suppose PESO.COM, a hypothetical Mexican Internet start-up, decides to raise 100 million dollars in the US. In its initial round of financing, PESO.COM issues one million shares of preferred stock at ten dollars a share, ten million shares of common stock at five dollars a share, twenty million dollars in short-term debt and twenty million dollars in long-term debt. A year later PESO.COM returns to the market and borrows another ten million dollars in short-term debt. As the law is now being interpreted, PESO.COM has to send a check for $2,500.00 to Mr. Puglisi, or someone like him, every year for as long as the securities are outstanding. What does the American investor gain from this? What does PESO.COM gain from this? The only person who seems to be profiting is the unrelated third party who is capitalizing on an anachronism in the system.

II. THE LEGISLATIVE HISTORY OF THE "DULY AUTHORIZED REPRESENTATIVE" REQUIREMENT

The Securities Act of 1933 was passed in response to the financial meltdown of 1929.[22] Congress felt that US investors needed a regulatory mechanism that would guarantee

---

board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security.

22. *See* BARRIE A. WIGMORE, THE CRASH AND ITS AFTERMATH: A HISTORY OF THE SECURITIES MARKETS IN THE UNITED STATES, 1929–1933 425 (Robert Sobel ed., Greenwood Press 1985).

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

transparency and the free flow of information.[23] To that end, the Securities Act requires issuers to submit registration statements to the SEC prior to issuing stock.[24] Foreign issuers must also affix the signature of their USDAR to their statements.[25] As noted above, the Securities Act does not define the qualifications of a USDAR. The Act also does not state what liabilities, if any, a USDAR is subject to. However, the legislative history of the various bills and resolutions, the predecessors of the 1933 Securities Act, provide insight into Congress's intent in enacting the USDAR requirement.

House Resolution 431426 ("H.R. 4314") was introduced on March 29, 1933, and contains the detailed registration requirements for issuers of securities. Section 4 of the bill details the signatory requirements incumbent upon foreign issuers. Section 4 states:

> That all securities heretofore referred to in section 3 of this Act shall be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement signed by the issuer or issuers, its or their principal executive officer or officers, the principal financial offices or officers, and the directors, trustees or managers; if there is no board of directors, by the persons or board having the power of management of the person, corporation, association or other entity issuing the said securities: *Provided,* That when such statement relates to securities issued by a foreign government or political subdivision thereof, it shall be signed by the person, persons, or, if a corporation, association, or other

---

23. *See* S. REP. NO. 73-47, at 1 (1933), *reprinted in* 2 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 17, at 1 (J.S. Ellenberger & Ellen P. Mahar eds., 1973) (resolving that the aim of the act was to "prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor . . ." and that these aims may be "largely achieved upon the basis of fidelity to truth").

24. *See* 15 U.S.C. § 77e(c) (1994) (requiring a registration statement to be filed before a person offers to sale or offers to buy a security); *see id.* at § 77f(a) (requiring this registration statement to be filed with the Commission). The original act required submission to the Federal Trade Commission. *See* WIGMORE, *supra* note 22, at 425.

25. *See* 15 U.S.C. § 77f(a) (requiring that "in case the issuer is a foreign or Territorial person," the duly authorized representative in the U.S. must sign the registration statement).

26. This article focuses on those proposals that eventually were incorporated into the Securities Act. House Resolution 4500 is not discussed because it was not incorporated. Under 4500, all privately issued securities were subject to identical registration requirements. *See* H.R. 4500, 73d Cong. (1933), *reprinted in* 3 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 23, at 1 (J.S. Ellenberger & Ellen P. Mahar eds., 1973).

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

> entity, by the principal executive officer, the principal financial officer, and the directors or, if there is no board of directors, by the persons or board having the power of management of the person, firm, corporation, association, or other entity negotiating the loan or acting as the selling agent or underwriting such security for sale in the United States as the Commission may require.[27]

The first half of Section 4 applies to all securities covered by Section 3—securities other than those issued by foreign governments. Thus, all private domestic issuers, foreign and domestic, must affix the signatures of their officers and directors to registration statements filed with the commission.[28]

The second half of Section 4, that is the text beginning with the word "*Provided*," is ambiguous. The provision clearly reaches securities issued by foreign governments. Section 4 requires foreign government issuers to have their registration statements signed by the US "entity negotiating the[ir] loan," by their US "selling agent," or by their US "underwrit[er]."[29] It is not evident, however, whether this provision also reaches foreign private issuance.

The difficulty in understanding the second half of Section 4 derives from the ambiguous nature of the phrase "or if a corporation, association, or other entity," which can be understood in two different ways.[30] One possible interpretation of the phrase is that foreign corporations, foreign associations, or other foreign entities issuing stock in the US are also subject to the requirement embodied in the second half of Section 4. According to this reading, foreign private issuers would have to affix the signature of their US underwriter or US selling agent to their registration statements. If this interpretation is correct, this requirement is the first mention of an additional requirement that is incumbent upon foreign issuers, a precursor of sorts to the "duly authorized representative" requirement.

It is equally possible, however, that Section 4 is only directed to a foreign government issuer. According to this reading, the phrase "or if a corporation, association, or other entity" is merely defining who must sign the registration statement on behalf of the foreign government. This approach interprets the statute as

---

27. H.R. 4314, 73d Cong. § 4 (1933), *reprinted in* 3 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 22, at 6 (J.S. Ellenberger & Ellen P. Mahar eds., 1973).

28. On its face, Section 3, and consequently Section 4, may apply to domestic governmental issuers. *See id.* However, this issue is beyond the scope of this paper.

29. *See supra* text accompanying note 27.

30. *See* 3 LEGISLATIVE HISTORY, *supra* note 27.

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

saying a foreign government issuer must obtain the signature of their US underwriter. Furthermore, the phrase "or if a corporation, association, or other entity" describes whose signature must be obtained. If the underwriter is an individual, the foreign issuer attaches the signature of the individual. If, however, the underwriter is "a corporation, association, or other entity," then the foreign government must obtain the signatures of the underwriter's officers and directors.

These different possible interpretations of Section 4 are reflected in the following committee discussion:

> MR. BULWINKLE. Let me ask you, Mr. Butler, what provision do you make in this bill for foreign corporations' securities as to the underwriters or selling agents? . . . [I]t is not provided for in section 4.
>
> MR. BUTLER. It is provided that they shall sign the statement; yes, sir
>
> MR. BULWINKLE. There is not one particle of mention in it as to any corporate body . . . .
>
> MR. BUTLER. There is this provision: "*Provided,* That when such statement relates to securities issued by a foreign government . . . or, if a corporation—" And so forth.
>
> MR. BULWINKLE. That needs amendment very badly.[31]

It appears that Mr. Bulwinkle understood the phrase, "or if a corporation," to describe an underwriting entity, while Mr. Butler understood the phrase as referring to a foreign private issuer.[32]

---

31. 2 LEGISLATIVE HISTORY (statement of Ollie M. Butler, Foreign Service Division, Department of Commerce), *supra* note 14, at 118–19.

32. *See also* 2 LEGISLATIVE HISTORY (statement of William C. Breed, representative, Investment Banker's Association of America), *supra* note 14, at 188 (embracing Mr. Bulwinkle's approach). Mr. Breed's amendment proposed the following revision (with new matter in italics):

> *Provided,* That when such statement relates to securities issued by a foreign government or political subdivision thereof, *it shall be signed by an official representative of such foreign government or political subdivision, and by the underwriter thereof in the United States, and if such underwriter be* a corporation, association, or other entity, by *its* principal executive officer, *its* principal financial officer and *its* directors, trustees or managers, or if there be no board of directors, *by any*

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

If Mr. Bulwinkle's understanding is correct, then H.R. 4314 Section 4 does not shed any light on the current "duly authorized representative" requirement. If, however, Mr. Butler is correct and the latter half of Section 4 applies to foreign private issuers,[33] then H.R. 4314 Section 4 is the first congressional attempt at codifying what has become the "duly authorized representative" requirement.

According to Mr. Butler's understanding, however, it is possible that there are no substantive differences between the registration requirements incumbent upon foreign private issuers and those incumbent upon domestic private issuers.[34] Although Section 4 distinguishes between foreign and domestic issuers, the distinction may not be material.

Under H.R. 4314 Section 4, both domestic and foreign private issuers are required to include the signatures of their

---

> *individual or the members of any* board having the power of management of *such* corporation, association or other entity. . . .

33. *Compare* 3 LEGISLATIVE HISTORY, *supra* note 27, at 6–7:

> That all securities heretofore referred to in section 3 of this Act shall be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement signed by the issuer or issuers, its or their principal executive officer or officers, the principal financial officers, and the directors trustees or managers; if there is no board of directors by the persons or board having the power of management of the person, corporation, association or other entity issuing the said securities: issuer: *Provided,* That when such statement relates to securities issued by a foreign government or political subdivision thereof, it shall be signed by the person or persons, or, if a corporation, association, or other entity, by the principal executive officer, the principal financial officer, and the directors or, if there is no board of directors, by the persons or board having the power of management of the person, firm, corporation, association, or other entity negotiating the loan or acting as the selling agent or underwriting such security for sale in the United States as the Commission may require . . . .

With H.R. 4314, 73d Cong. § 5(a) (1933), *reprinted in* 3 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 22, at 7 (J.S. Ellenberger & Ellen P. Mahar eds., 1973):

> That the said statement, when relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the following information concerning the said securities and the person or other entity issuing them: (1) The name under which the issuer is doing or intends to do business, the name of the State or other sovereign power under which the issuer is organized and the location of the issuer's principal office . . . .

34. Additional requirements for foreign issuers are certainly understandable considering the great losses that U.S. investors suffered in foreign securities investments during the 1920s. *See* WIGMORE, *supra* note 22, at 522–27.

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

officers and directors.[35] It is possible that foreign private issuers must also affix the signatures of their underwriter's officers and directors. This distinction could be significant because, absent this type of provision, there would be no entity reachable in the US in a securities violation case. The following discussion occurred during the committee hearings on H.R. 4314:

> Mr. Bulwinkle. Now, we come to the directors of . . . foreign corporations.
>
> Mr. Thompson. [Securities of] a foreign corporation . . . are just the same. They are sold on the same basis as domestic securities.
>
> Mr. Bulwinkle. Of course, you cannot reach [the foreign directors].
>
> Mr. Thompson. We cannot reach them, but we will reach the house in this country that is disposing of their securities.
>
> Mr. Bulwinkle. That would be, to a great extent, a dummy house.
>
> Mr. Thompson. I rather imagine that the dummies are going to disappear out of this picture. If this bill goes through, the dummy will not want to take the chance.
>
> Mr. Bulwinkle. Do you not think there ought to be some other restrictions in there with regard to the sale of foreign corporation stock? . . . [W]ith the American Corporation, both the underwriters and the directors are held responsible. But the only one that is responsible is the underwriter in the case of the foreign corporation; the underwriter of the stock or the security.[36]

It is evident from this exchange that the drafters contemplated at least one US entity signing a foreign issuer's registration statement. It is also evident that they believed this requirement was substantially equivalent to the one imposed on domestic issuers. However, because underwriters are liable under the civil liability provisions of the securities laws,[37]

35. *See supra* text accompanying note 27.

36. 2 LEGISLATIVE HISTORY (statements of Hon. Huston Thompson, former member of the Federal Trade Commission), *supra* note 14, at 51–52.

37. *See* 15 U.S.C.A. § 17k (West, WESTLAW through PL 106-170). This section is

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

whether or not they are required to sign the registration statement under Section 4 is immaterial.

According to this reading, the significance of Section 4 is that it requires foreign issuers to have US underwriters. Whereas a domestic issuer might employ a foreign underwriter, a domestic underwriter, or no underwriter at all, a foreign issuer must have a US selling agent.

Section 6(a) of House Resolution 5480 ("H.R. 5480"), introduced in May of 1933, tracks Section 4 of H.R. 4314.[38] However, in place of H.R. 4314's ambiguous description of the required signatures, H.R. 5480 merely requires the signature of a USDAR if the issuer is a foreign or territorial person.[39] H.R. 5480's formulation was ultimately passed into law as part of the Securities Act.[40]

There are two possible approaches to understanding the "duly authorized representative" requirement contained in H.R. 5480 and the Securities Act. It may represent a departure from the earlier formulation proposed in H.R. 4314. If so, interpretations of H.R. 4314's signature requirements do not shed light on the meaning of the statutory "duly authorized representative" requirement. If, however, the "duly authorized representative" formulation embraced in the Securities Act is just a shorthand for H.R. 4314's more detailed description, the committee discussions about the meaning of H.R. 4314 may help determine what Congress meant when they required the signature of a USDAR.[41]

Senate Bill 875 ("S. 875") was introduced on the same day as H.R. 4314; it had identical language and was equally

---

better known as section 11 of the original 1933 Act. *See Securities Act of 1933,* ch. 38, 48 Stat. 74 (1933), *reprinted in* 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934, Item 1, at 82 (J.S. Ellenberger & Ellen P. Mahar eds., 1973).

38. *Compare* H.R. 5480, 73d Cong. § 6(a) (1933) (enacted), *reprinted in* 3 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 24, at 11 (1973) *with* 3 LEGISLATIVE HISTORY, *supra* note 27.

39. *See* 3 LEGISLATIVE HISTORY, *supra* note 38, at 11. There are two additional differences between H.R. 4314 Section 4 and H.R. 5480 Section 6(a). The latter stated that a "security may be registered" (as does the current statute) while the former stated "securities. . .shall be registered." *Compare id. with* 3 LEGISLATIVE HISTORY, *supra* note 27. Additionally, H.R. 5480 Section 6(a) adds that the registration statement should be submitted in triplicate (as does the current statute). *See* 3 LEGISLATIVE HISTORY, *supra* note 38; *see also* 15 U.S.C.A. § 77f (West, WESTLAW through PL 106-170).

40. *See* 15 U.S.C.A. § 77f (West, WESTLAW through P.L. 106-170).

41. *See generally* 2 LEGISLATIVE HISTORY (statements made by participants in the committee hearings), *supra* note 14, at 1.

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

ambiguous.[42] The legislative history of the bill demonstrates that the Senate version was also subject to divergent interpretations.

At the time of its introduction, an "analysis" of the bill was entered in the congressional record.[43] Section 4 of the bill was described as providing that officers and directors of issuers would have to sign the registration statement, except in the case of "securities issued by a foreign government," for which the statement "shall be signed" by the underwriter.[44] Members of the Senate Banking and Currency Committee, on the other hand, expressed their understanding that foreign private issuers were also required to obtain the underwriter's signature.[45]

The Senate Banking and Currency Committee received a critique of the bill from Eustace Seligman, an attorney with Sullivan & Cromwell.[46] Mr. Seligman argued that "[t]he effect of this provision is thus to single out from all other securities the bonds of foreign governments."[47] He criticized this result at length, writing "[t]here is no reason why . . . bonds of foreign governments should be in a different category from . . . the bonds of domestic corporations."[48] Mr. Seligman's statement was entered into the committee record without comment.[49]

On May 8, 1933, an amended version of S. 875 was presented on the floor of the Senate.[50] In this version the Senate again rejected the House's recently minted "duly authorized representative" formulation. Instead, the Senate fine-tuned the language of Section 4 so as to make it clear that foreign private

---

42. *See generally* S. 875, 73d Cong. (1933), *reprinted in* 3 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 28 (J.S. Ellenberger & Ellen P. Mahar eds., 1973).

43. *See* 77 CONG. REC. 938, 938 (1933), *reprinted in* 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 4, at 938 (J.S. Ellenberger & Ellen P. Mahar eds., 1973).

44. 3 LEGISLATIVE HISTORY, *supra* note 42, at 6–7.

45. *See Securities Act: Hearings on S. 875 Before the Senate Comm. on Banking and Currency*, 73d Cong. 11–12 (1933), *reprinted in* 2 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 21, at 11–12 (J.S. Ellenberger & Ellen P. Mahar eds., 1973) (acknowledging U.S. citizens undertaking the responsibility of marketing foreign securities).

46. *See id.* at 282.

47. *Id.* at 283.

48. *Id.*

49. *See id.* at 282–85 (noting that Mr. Seligman "perhaps had more experience with the legal aspects of security issues than any other" lawyer in the U.S.).

50. *See* 77 CONG. REC. 2978–79 (1933), *reprinted in* 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 8, at 2978–79 (J.S. Ellenberger & Ellen P. Mahar eds., 1973) (stating the Senate agreed to consider S. 875 on May 8, 1933).

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

issuers were also required to obtain the signature of their US underwriter.[51] This version of the bill was passed by the Senate.[52]

The Senate did not explain why it chose to retain the earlier language of Section 4 and reject the House's "duly authorized representative" formulation. As discussed above, it is possible that the Senate viewed the House's "duly authorized representative" formulation as shorthand. If this was the case, then the Senate's refusal to adopt the shorthand does not mean that there was any substantive disagreement about the provision.

On the other hand, it is possible that the Senate viewed the House's formulation as substantively different. If so, in embracing the earlier formulation the Senate signaled that it did not agree with the change. Having reached an impasse, the Senate and House agreed to refer their bills to a joint conference.[53] The conference committee ironed out their differences and returned the bill to Congress. The conference version was accepted by both houses and enacted on May 27, 1933.[54]

The final version of the Securities Act requires a foreign private issuer to have its registration statement signed by its

---

51. *See id.* at 2995–96 (substituting language of amended S. 875 for language of H.R. 5480 and passing H.R. 5480 with the substituted language). H.R. 5480 states in pertinent part, as read into the record:

> . . . when such statement relates to securities issued by a foreign government or political subdivision thereof, or by any person residing in or by any corporation or association organized under the laws of any foreign country, it shall be signed by the person or persons negotiating the loan in the United States or territory or acting as the fiscal or selling agent for the sale of such security in the United States or territory or underwriting such security for sale in the United States or territory, and by the principal executive officers, principal financial officers, and the directors or other managing officials of such person or persons.

52. *See id.* at 2996 (passing H.R. 5480 with the substituted language of amended S. 875).

53. *See* 77 CONG. REC. 3085 (1933) *reprinted in* 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 9, at 3085 (J.S. Ellenberger & Ellen P. Mahar eds., 1973) (agreeing to the conference requested by the Senate).

54. *See* 77 CONG. REC. 3891, 3903 (1933) *reprinted in* 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 13, at 3903 (J.S. Ellenberger & Ellen P. Mahar eds., 1973) (agreeing to the conference report submitted in the House on May 22, 1933); 77 CONG. REC. 3879, 4009 (1933) *reprinted in* 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 14, at 4009 (J.S. Ellenberger & Ellen P. Mahar eds., 1973) (agreeing to the conference report submitted to the Senate on May 22–23, 1933); 1 LEGISLATIVE HISTORY, *supra* note 37, at 74 (enacting the Securities Act of 1933 on May 27, 1933).

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

officers and directors, and also by its USDAR.[55] Foreign government issuers, on the other hand, need only obtain the signature of their underwriter.[56]

The conference committee submitted a detailed report of the major differences between the two proposals and described how those differences had been resolved.[57] However, no mention was made of the two different formulations of the foreign issuer requirement. This absence indicates that the committee did not believe there was any substantive difference between the two versions. Furthermore, at no time during any of the committee reports did anyone even so much as note the difference between the two versions. This silence is too loud to ignore.

The statutory term "duly authorized representative" refers to an individual who is either an underwriter, an officer or a director. The statute requires foreign private issuers to affix the signature of one of these individuals to their registration statements.[58] Foreign issuers who hire unrelated third party "representatives" are wasting their time and resources. If a US underwriter has signed the registration statement, then they have satisfied their requirement. As noted above, a foreign issuer's underwriter must sign its registration statement in order for the Commission—or a plaintiff—to "reach the house in this country that is disposing of [the] securities."[59] If, on the other hand, they have not obtained the signature of their US underwriter, the signature of this "dummy" representative is worthless. The signatory requirements were designed "to do away with the use of a 'dummy director,' who can be used to sign any kind of a document . . . ."[60]

If the foreign issuer must always obtain the signature of its US underwriter, why then does the statute describe the foreign private issuer requirement differently than the foreign government issuer requirement? With regard to a foreign private issuer, the statute uses the phrase "duly authorized representative" because a foreign private issuer need not obtain

---

55. 15 U.S.C. § 77f (1994).

56. *See id.*

57. *See generally* H.R. CONF. REP. NO. 77-3891, at 3901 (1933), *reprinted in* 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITY EXCHANGE ACT OF 1934, Item 13, at 3901 (J.S. Ellenberger & Ellen P. Mahar eds., 1973) (indicating that "[t]he differences between the House bill and the substitute agreed upon by the conferees are noted in the following discussion").

58. *See* 15 U.S.C. § 77f (1994).

59. 2 LEGISLATIVE HISTORY, (statement of Hon. Huston Thompson former member of the Federal Trade Commission) *supra* note 14, at 51.

60. *See id.* at 15.

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

the signature of its underwriter if one of its officers or directors is in the US. In such a scenario the foreign issuer satisfies the requirement the same way a domestic issuer would. It is only when a foreign private issuer's officers and directors are outside the US that it must obtain the signature of its US underwriter.

With regard to a government issuer, on the other hand, the statute seems to demand the signature of its US underwriter. It seems from the statutory language that a foreign government issuer cannot satisfy its signatory requirements by having its "duly authorized representative" sign the registration statements. The signature of a government representative may not suffice because of the political difficulty involved in holding a diplomatic official liable under the securities laws. As a result, the underwriter's signature is required. It is possible, however, that a government issuer might satisfy its requirement with the signature of its USDAR.

III. THE CASE LAW

No case has yet addressed the USDAR qualifications for foreign private issuers. The only recorded case discusses the requirements as they relate to foreign governmental issuers.[61]

As noted above, the statute seems to distinguish between a foreign private and a foreign government issuer by requiring the former to obtain the signature of its duly authorized representative and the latter to obtain the signature of its US underwriter. However, a strong argument can be made that a foreign government issuer could satisfy its requirement with the signature of its "duly authorized representative;" that is, with the signature of the political equivalent of an officer or a director or with the signature of an underwriter.

In *Chinese Consol. Benevolent Ass'n*, a federal district court stated in dicta that a foreign government issuer could satisfy its statutory requirement by having its registration statement signed by a "duly authorized representative."[62] In its opinion, the court first quoted the bifurcated requirements of Section 6(a) of the Securities Act:

---

61. *See* SEC v. Chinese Consol. Benevolent Ass'n, 39 F. Supp. 85, 89 (S.D.N.Y 1940), *rev'd,* 120 F.2d 738 (2d Cir. 1941) (discussing the signatory requirements for a foreign governmental issuer).

62. 39 F. Supp. at 89 (quoting 15 U.S.C. § 77f). At issue in *Chinese Consol. Benevolent Ass'n* was whether a volunteer who was arranging for the sale of Chinese securities was an underwriter within the meaning of the Securities Act. The district court found that they were not. The Second Circuit later reversed the decision when they ruled that the volunteer was an underwriter within the meaning of the act. *See* SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738, 741 (2d Cir. 1941).

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

> . . . in case the issuer is a foreign or Territorial person [its registration statement must be signed] by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security.[63]

The court then stated:

> [s]ince the defendant is not an underwriter or an agent it has no authority to do so. The Republic of China is, of course, officially represented in the United States, but it does not appear whether 'its authorized representative' has ever been requested to file a registration statement. (No attempted backdoor entrance to this Court can be permitted to compel such a result; the channels of diplomacy are open through the Department of State.)[64]

Although the court quoted this provision in response to a collateral argument that had been raised by the SEC,[65] it is evident the court believed that a foreign government issuer could satisfy its signatory requirements with the signature of a duly authorized representative.

Thus, both the legislative history and the one recorded case do not show any substantive difference between the signatory requirements imposed on foreign government issuers and those placed on foreign private issuers. Both must affix the signature of either a US based officer, director, diplomat or underwriter; neither can satisfy this requirement through the substitution of a "dummy director".[66]

---

63. *Chinese Consol. Benevolent Ass'n*, 39 F. Supp. at 89.

64. *Id.*

65. *See id.* (rejecting the argument of the SEC that an agent of the issuer was an underwriter).

66. The term "dummy director" is used extensively in the legislative history. Congress was worried that companies would just have a nominal USDAR that was not really involved with the company and thus did not have any liability. *See, e.g.*, 2 LEGISLATIVE HISTORY, *supra* note 14, at 15.

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

IV. THE SEC

The SEC has not formally defined the qualifications of a USDAR. They have, alternatively, issued a handful of releases addressing the issue. In 1962 the SEC noticed two proposed rules for comment—Rules 402A and 440.[67] In the proposal, Rule 402A defined who could serve as a USDAR.[68] Under 402A if securities were being offered through an underwriter, the authorized representative had to be named as the "underwriter, or one of the underwriters, of such securities."[69] Since the overwhelming majority of securities are offered through an underwriter, the proposed rule effectively required a foreign issuer's "duly authorized representative" to be an underwriter. Unfortunately, the SEC ultimately withdrew proposed Rule 402A from consideration.[70] They reasoned that the existing rules were adequate and the proposed rule therefore unnecessary.[71]

In 1981, the SEC proposed new forms for foreign issuers.[72] In its release, the SEC described the USDAR requirement. It noted that:

> the Commission generally accepts the signature of an individual who is an employee of the registrant or an affiliate, or who is the registrant's counsel or underwriter in the United States for the offering, because the signature clearly identifies an individual that is connected with the offering as subject to the liability provisions of the Securities Act. By similar reasoning, the Commission generally has refused to accept the appointment of a newly formed or shell corporation in the United States as the authorized representative.[73]

It is evident from these releases that the SEC's understanding of the USDAR requirement is in line with the

---

67. *See* Registration of Securities by Foreign Issuers, Notice of Proposed Rule Making, 27 Fed. Reg. 6943 (1962).

68. *See id.*

69. *Id.*

70. Withdrawal of Proposals for Adoption or Revision, 30 Fed. Reg. 1010 (1965).

71. *See id.*

72. *See* Integrated Disclosure System for Foreign Private Issuers, 46 Fed. Reg. 58511 (1981) (proposing new forms to be used to register securities offerings by foreign private issuers).

73. *See id.* at 58521.

COPYRIGHT © 2001 HOUSTON BUSINESS AND TAX LAW JOURNAL. ALL RIGHTS RESERVED.

understanding embraced in the case law. The SEC also believes that the USDAR is supposed to be someone "connected with the offering."[74]

V. CONCLUSION

Issuing securities in the United States is expensive. The investment bankers take their cut and the legal fees are high. It is unfair to require foreign issuers to unnecessarily pay additional funds. The costs associated with the USDAR requirement can easily escalate for companies with many debt and equity offerings. The SEC and Congress should not tolerate the perpetuation of a practice that does not provide the consumer with any discernible benefit and lines the pockets of the few at the expense of the integrity of our securities laws.

74. *Id.*